COMMENT.

When a witness refuses to answer a question upon the ground that it will tend to incriminate him the question often arises as to who shall determine whether his answer will have this effect, and the case of *Ex parte Irwine*, 74 Fed. Rep. 954, recently decided by the United States Circuit Court rules upon this point.

In a trial upon indictment for violating interstate commerce laws, the witness refused to answer several questions and was committed to jail for contempt of court. He applied for a writ of habeas corpus and in rendering judgment the Circuit Court stated that it would be subversive of every principle of right and justice to allow a witness to evade answering a question upon the bare statement that his answer would tend to incriminate him, and held that "it is for the trial judge to decide whether an answer to the question put may reasonably tend to incriminate the witness, or furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is not enough that the answer may furnish evidence which upon some imaginary hypothesis would supply the missing link, but it must appear to the court from the character of the question and other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime. If once the fact of his being in danger be made to appear, great latitude should be allowed him in judging for himself the effect of any particular answer, and if he says upon oath that he cannot answer without accusing himself, he cannot be compelled to do so."

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The very interesting and important question of the effect of endorsement of bills to fictitious persons, recently came before the Supreme Court of Tennessee, in *Chism, et al.*, v. *Bank* (36 S. W. R. 387). The facts were as follows: A firm of cotton factors innocently issued and endorsed a draft to a fictitious person or order, whom their warehouseman fraudulently represented to them to be a real person and consignor of cotton. The warehouseman, using the name of the fictitious person, indorsed the draft to himself or order, collected it and absconded. On discovering the fraud practiced the drawer sued the defendant bank for wrongful appropriation of the the draft and refusal to account for the proceeds.

It seems from a note to Bayles Bills, page 179, that the controversy over the effect of endorsement of bill to fictitious per-

sons grew out of the bankruptcy of Linsay & Co. and Gibson & Co., London merchants, who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a year. A great many cases grew out of these endorsements in the various courts of England, one of which, *Meriet* v. *Gibson* (1789), 3 Term. R. 481, was carried to the House of Lords. But in all those cases the drafts were *purposely* drawn in favor of non-existing parties, and the decision established the doctrine (which has been followed in subsequent cases) that where the drawer or maker of a bill of exchange knows that the payee is a fictitious person at the time he makes the draft, a bona fide holder may recover on it against him as upon a bill *payable to bearer* (*Satlock* v. *Harris*, 3 Term. R. 174; *Gibson* v. *Hunter*, 2 H. Bl. 187).

But where the drawer innocently issues or endorses the draft in favor of a fictitious person, believing him to be real, as in the case at hand (36 S. W. R. 389), another element is introduced into the controversy. The questions arising out of the case and submitted to the Supreme Court of Tennessee have arisen and been discussed in but few of the American courts, and the conclusions reached by them have been various. Some of the authorities hold that it will be no defense against a bona fide holder for the maker or drawer to set up that he did not know the payee to be fictitious, even though he was free from any negligence in drawing or making the draft. Others hold that it is a defense where drawer or maker was ignorant of the non-existence of the payee, provided that drawer was guilty of no negligence.

On the one hand, in this country, among text writers, Mr. Daniel states the rule as general that, "In the case of a note payable to a fictitious person it appears to be well settled that any bona fide holder may recover on it against the maker, as upon a note *payable to bearer*. It will be no defense against such a bona fide holder for the maker to set up that he did not know the payee to be fictitious." The case of *Kohn* v. *Watkins*, 26 Kansas 691, involved the precise questions which were brought up in the Tennessee case, and the Kansas court followed the authority of Mr. Daniel. Hatton, C. J., in his opinion, said: "When a drawer issues a bill to a fictitious payee, although ignorant of that fact at the time, and parts with the possession thereof, ought he, in fairness and justice, be allowed to say that such bill is void?" Where one of two innocent parties must suffer from the wrongful or tortious acts of a third party, the

law casts the burden or loss upon him by whose act, omission or negligence such third party was enabled to commit the wrong which occasions the loss" (*Bank* v. *Rld. Co.*, 20 Kan. 520) All of these cases hold that the drawer is estopped from setting up as a defense that he did not know such payee to be fictitious (*Cooper* v. *Mayer*, 10 B. & C. 468; *Schutz* v. *Astley*, 2 Bing. N. C. 544).

Upon the other hand we have several well-considered cases which in effect adopt the English rule, to wit, that only such paper as is issued to a fictitious payee or endorsee by the party sought to be bound, with full knowledge of the fact, shall be treated as payable to bearer. This seems to be the better law, and was followed by the Tennessee courts.

Supporting this view in *Armstrong* v. *Broadway Nat. Bk.*, 22 N. E. R. 866, it was held: "Where by the fraud of a third person a depositor of a bank is induced to draw his draft payable to a non-existing person or order, the drawer being in ignorance of the fact and intending no fraud, the bank on which the draft is so drawn is not authorized to pay it, and charge the amount to the account of its customer, on the endorsement of the party presenting it, although it appears to have been previously endorsed by the party named as payee. Such endorsement is in effect a forgery, and the payments thereon by the bank confers no right on it as against the drawer of the draft." In this case the authorities are carefully reviewed. See, also, the cases of *Dodge* v. *Bank*, 20 Ohio St. 234; *Shipman* v. *Bank*, 27 N. E. 371; *Byles* on *Bills*, p. 82; *Forbes* v. *Epsy*, 21 Ohio St. 483.

O'Brien, J., in one of the cases, says: "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person."

A bank holds a depositor's funds to be paid out to such persons as the depositor directs. It is its duty to pay to the person named or his order, and to withhold payment until it is satisfied as to the identity of the payee and the genuineness of his signature (Morse. Bank, Sec. 474). If a bank pursues any other course it does so at its own peril.

It is a saying frequently repeated in "The Doctor and the Student," says Minshall, C. J., that "he who loveth peril shall perish in it." In other words, where a person has a safe way, and abandons it for one of uncertainty, he can blame no one but himself if he meets with misfortune.